BOARD GENDER DIVERSITY IN MEXICO: AN ANALYSIS AND PROPOSAL FOR REFORM*

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Abstract: The lack of gender diversity on companies' boards has become a matter of global concern in recent years. In many countries, this concern has been matched by robust action to increase the number of women directors. Other countries, however, have fared rather less well. Mexico exemplifies the latter group, as well as many of the reasons why progress towards greater diversity has often been slow in such countries. This article explains why we should care about a lack of gender diversity, and why these reasons for caring apply to countries such as Mexico, notwithstanding their distinctive social structures and corporate landscapes. It examines a number of comparator countries where greater progress has been achieved, and proposes a strategy for increasing the number of women directors.

Keywords: Corporate governance; company law; Mexico; board gender diversity.

I Introduction

Globally, it has been estimated that about 16.9% of company directors are women.[1] This figure, however, hides large variations between different countries and continents. Whilst many European, Australasian, North American and some African countries have higher, and steadily improving, levels of female board membership, many Asian and Latin American countries fare much less well.

Mexico illustrates this pattern. With women occupying around 6.5% of board seats,[2] it has one of the lowest rates of female board membership even within Latin America. Perhaps still worse than the lack of female directors is the lack of any concerted national effort to improve matters. As Deloitte's global survey of board diversity observes, '[t]here

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[1] See Deloitte, *Women in the boardroom: A global perspective* (6th Ed. 2019) (hereafter 'Deloitte WB') p.8. The 5th edition (2017) of the same publication recorded a figure of approximately 15% (p.3).

[2] *Ibid*, p.11. See also OECD, *OECD Corporate Governance Factbook 2019* https://www.oecd.org/corporate/corporate-governance-factbook.htm Table 4.17, which suggests that women comprised 7.5% of Mexican board positions at 2017.

are no current national or government initiatives to increase the number of women serving on corporate boards'.[3]

The experience of other countries suggests that improvements can be secured, however, and surprisingly quickly. We argue that they can be achieved for Mexico too. We suggest a mix of both 'process' oriented reforms, designed to ensure more women are able to compete successfully for board appointments, and a quota, beginning modestly but increasing over time, which will be binding on listed companies as new board appointments are made.

To justify those recommendations, the article is structured as follows. Part II is scene setting, examining the current state of play on board diversity within Mexico. It shows the absence of any regulatory norms promoting diversity and provides more data on female board membership. Part III asks why we should care about the lack of board diversity described in Part II. Part IV turns to questions of strategy. It notes a range of methods for improving diversity and draws lessons from the recent experience of six comparator countries. Part V develops the suggestions for reform sketched out above, whilst Part VI concludes.

II Board Gender Diversity In Mexico

A The Mexican corporate landscape

Mexico offers a variety of different legal forms through which businesses may operate. About 90%[4] of Mexican businesses are formed as 'Stock Corporations' ('SA').[5] The SA has a flexible regulatory regime, and can be adapted for use by large and small enterprises alike.[6] The majority of Sas, however, are micro, small, or medium-sized, companies.[7] They are usually controlled either by families or by closed groups of people, with all shareholders knowing each other.[8] A 2014 study by the Business Family Foundation, for

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[3] Deloitte WB n.1, p.58.

[4] See Cecilia Cajiga, Deloitte México in Lucero Almanza, 'Ven Desuso en Sociedades Mercantiles' (2006) *Grupo Reforma* available at: <http://reforma.vlex.com.mx/vid/ven-desuso-sociedades-mercantiles-194928871>

[5] The abbreviation for *Sociedad Anónima,* with which the SA's name must end. Besides the SA, businesses can also use the limited liability company (whose name must end with *Sociedad de Responsabilidad Limitada,* or its abbreviation S.de R.L) or three types of partnership, namely the 'General Partnership', the 'Limited Liability Partnership' and the 'Limited Liability Stock Partnership'.

[6] The Limited Liability Company is falling into disuse in Mexico. Its perceived shortcomings include the limit on the size of its membership, which must not exceed 50, and restrictions on the transfer of ownership interests. See Guadarrama in Victor M Castrillón y Luna, 'Ley General de Sociedades Mercantiles Comentada' (8th edn, Editorial Porrúa 2016) p.57.

[7] They are usually collectively referred to as MIPYMES: *Micro, Pequeñas y Medianas Empresas*.

[8] Carlos A Gabuardi, 'La Sociedad en Nombre Colectivo en Mexico' (2014) *Revista de Derecho*

example, estimated that about 90% of Mexican businesses were controlled in this way, ranking Mexico fifth, globally, in terms of the proportion of family owned companies.[9] This pattern of share-ownership usually means that there is not the degree of 'separation between ownership and control' that exists in, say, the UK or the US.[10] The possible implications of this for board diversity will be addressed below. First, however, we sketch out the current regulatory framework for board composition in Mexico.

B The regulation of board composition in Mexico

The law governing SAs is composed primarily of three sets of rules. The first is the General Law of Commercial Companies, the *Ley General de Sociedades Mercantiles* ('LGSM'). This regulates the structure and operation of all business entities in Mexico. The second is the Securities Market Law, the *Ley del Mercado de Valores* (the 'LMV'). The third comes from Mexico's *Best Corporate Practices Code* ('the Code').[11] Whilst, taken together, this regulatory framework says something about both the role and the composition of boards, it remains almost entirely silent on the board's gender balance.

(i) The General Law of Commercial Companies (LGSM)

We have noted already that one of the attractions of the SA lies in its flexibility. Its approach to board composition illustrates this quality well. The LGSM provides few rules governing the composition or membership of the board, and none of these rules addresses the gender of directors. So, whilst Art.142 provides that management of the SA shall be entrusted to directors, it does not stipulate how many directors there should be, and the choice of directors is left entirely to the shareholders' general meeting.[12] The LGSM imposes no gender quota on the membership of the board, nor does it require, or even encourage, companies to take into account both women and men in the appointment of directors.

Privado III(5) UNAM, Centro de Investigaciones Jurídicas, p.52.

[9] Oscar Santamaría from Business Family Foundation in Miguel A Pallares, 'Mexico es el Quinto País con Más Empresas Familiares a Nivel Mundial' (February 2014) *El Financiero,* available at: <http://www.elfinanciero.com.mx/archivo/mexico-es-el-quinto-pais-con-mas-empresas-familiares-a-nivel-mundial.html>

[10] Mathias Siems and David Cabrelli, *Comparative Company Law, A Case-Based Approach* (Hart Publishing Ltd, 2nd Ed., 2018) p.6.

[11] See below n.24.

[12] LGSM, Article 118. The only proviso is that if the company is to be managed by a board (rather than by a single director), then minority shareholders representing 25% of the capital stock have the right to select at least one director. That percentage is reduced to 10% for companies that have registered their stock in the Mexican Stock Exchange: LGSM, Article 144.

(ii) The Securities Market Law (LMV)

The LMV was introduced in 2005, with the aim of improving standards of corporate governance in Mexico and thereby facilitating capital-raising by Mexican companies.[13] It creates three sub-types of SA, which can be used by SAs at different stages in the cycle of attracting public investment. In addition to the relevant rules of the LMV, each of these three sub-types remains subject to regulation under the LGSM.[14]

The Public Stock Corporation *(*'SAB')[15] is the equivalent of a listed company, and is subject to the most onerous governance rules. Alongside the SAB sit the 'SAPI'' and the 'SAPIB'.[16] The SAPI is designed "to accommodate private equity investments, and serves as a transition from a closely held corporation into a publicly held company".[17] The SAPIB aims "to help medium-sized enterprises to obtain resources through the market, by offering the same rights as the SAB but with fewer reporting and corporate governance requirements."[18]

For each of these three types of SA, the LMV lays down a number of rules relevant to the composition and functioning of their boards. Each form must indeed have a board, and shareholders holding 10% of the voting shares[19] may appoint and remove one board member.[20] For SABs, the board must not exceed 21 members, of whom at least 25% must be 'independent'.[21]

Nothing in the LMV, however, regulates the gender balance of boards. It does not stipulate that a board must contain any minimum number, or proportion, of directors of

[13] For the stated goals of the LMV, see Article 1.
[14] LMV, Article 5.
[15] SAB stands for *Sociedad Anónima Bursátil.* Most companies listed on the Mexican Stock Exchange are SABs.
[16] SAPI stands for *Sociedad Anónima Promotora de Inversión* whilst SAPIB stands for *Sociedad Anónima Promotora de Inversión Bursatil*. By Article 19, the SAPIB must adopt the form of a SAB within ten years of its incorporation.
[17] Dina Moreno and Jorge Montaño, 'SAPIs to Promote Private Equity in Mexico' (April 2006) *International Financial Law Review,* available at: <www.iflr.com/Article/1984607/SAPIs-to-promote-private-equity-in-Mexico.html>
[18] Romina Román, 'CNBV Modificará Regulación Para las SAPIB' (February 2015) *El Economista,* available at: <http://eleconomista.com.mx/mercados-estadisticas/2015/02/09/cnbv-modificara-regulacion-las-sapib>
[19] Whether individually or in aggregate and including limited or restricted voting rights.
[20] LMV, Article 16-I. The threshold was decreased from 25% under the LGSM.
[21] LMV, Article 24. For the SAPIB, only one independent board member is required: LMV, Article 19-II. For the SAPI, no independent board member is required: LMV, Article 15. Independence is defined as "chosen on the basis of their experience, capability and professional prestige": LMV, Article 26.

different genders, nor does it provide that the gender balance of the board as a whole should be a factor in appointing individual directors.

It is worth pausing here to ask whether any other legal rules indirectly require directors to address the board's gender diversity. *If* companies are better served by having more diverse boards, for example, would not a director's failure to ensure a diverse board constitute a breach of the duty of care directors owe to their company? There are two inter-related difficulties in trying to tease a requirement for board diversity out of a director's duty of care. First, although – as we shall see in Part III – there is much evidence suggesting that more diverse boards can outperform less diverse ones, the evidence is by no means unequivocal. Second, according to the LMV, the members of the board of directors, when acting in good faith, shall not incur any liabilities "whenever they have chosen the most appropriate alternative, to the best of their knowledge and belief."[22] Thus, given current empirical uncertainties regarding the impact on a company's performance of a more diverse board, it would seem easy for a director to argue that he considered, in good faith, and to the best of his knowledge and belief, that the board's membership, although lacking in diversity, was appropriate for the company.[23]

(iii) The Mexican Corporate Governance Code.

The third source of rules regulating SAs is the Code of Principles and Best Practices of Corporate Governance *(Código de Principios y Mejores Prácticas de Gobierno Corporativo)* ('the Code'). First issued in 1999, by the Business Coordination Council (*Consejo Coordinador Empresarial*), its current version was published in 2018.[24] Although adherence to most of its provisions is voluntary, companies listed on the Mexican Stock Exchange must 'comply or explain non-compliance' with its

[22] LMV Article 40-III.

[23] It would be different if a company had a policy of never appointing a female director. The first article of the Mexican Constitution prohibits discrimination by gender. Under the Federal Law to Prevent and Eliminate Discrimination, restricting opportunities of access, permanence and promotion of employment are regarded as discrimination; see Ley Federal Para Prevenir y Eliminar la Discriminación Article 9-III. And, under the Federal Labour Law, conditions that imply discrimination among workers due to gender are not permitted. See Ley Federal del Trabajo Article 3.

[24] The Code is available at:
https://ecgi.global/sites/default/files/codes/documents/codigo_digital_v20_f.pdf
For a brief history of the Code's genesis, and some aspects of its subsequent development, see OECD, *Country Report: Voluntary Corporate Governance Code in Mexico* (2007) available at: <http://www.oecd.org/daf/ca/corporategovernanceprinciples/39741190.pdf>

recommendations, and some of its provisions are repeated as mandatory requirements in other statutory provisions.[25]

The content of the latest version of the Code, like that of its predecessors, reflects many of the recommendations that have become familiar in similar codes around the world,[26] with particular emphasis on the role, structure and composition of the board. On the role of the board, it emphasises that this is not to manage the company, but instead to monitor and control those that do, as well as to define and develop the company's strategic vision.[27] On board structure, it recommends the creation of one or more board sub-committees, composed of independent directors, and charged with supporting the full board in respect of certain key areas of governance.[28] As to board composition, it recommends between three and fifteen members,[29] and that at least 25% of the directors be 'independent' of management.[30] Furthermore, the 2018 version of the Code notes, for the first time, the importance of including women on the board, to add to the diversity of the board's knowledge and experience,[31] and Best Practice recommendation 15 formally recommends the inclusion of women on the board. However, no target is set, there are no recommendations that companies adopt policies to foster and achieve greater gender diversity, nor are companies required to report on progress in achieving any self-imposed target or policies.

C Current practice regarding board composition in Mexico

We have noted already that Mexico has a relatively concentrated ownership structure, with family-ownership predominating. Board membership is often dominated by those families with controlling ownership. It has been estimated that about 86% of small companies in Mexico have a controlling shareholder and 74% of those shareholders are also the directors of the company they control.[32]

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[25] See the Code, Introduction, p.9. It was agreed that the different regulatory authorities could take from the Code what they considered should be mandatory for companies regulated under their competence area.
[26] Diego Martínez, 'Corporate Governance 2016: México' (9 December 2015) *Latin Lawyer*, available at: <http://latinlawyer.com/reference/topics/69/jurisdictions/16/mexico/>
[27] The Code, Chapter 2, p.12.
[28] Those areas are (i) Audit, (ii) Evaluation and Compensation, (iii) Finance and Planning and (iv) Risk and Compliance. See Code, Chapter 4, Section 4.3.
[29] The Code, Chapter 4, Section 4.2, Best Practice recommendation 10.
[30] The Code, Chapter 4, Section 4.2, Best Practice recommendation 13.
[31] The Code, Section 4.2, discussion accompanying Best Practice recommendation 15.
[32] Carlos Simón and Mayra Gómez, 'Encuesta a Empresas Familiares 2012' (2013) *PWC Mexico* p.5.

Mexico also has one of the lowest rates of female representation on boards (or in senior management positions) in Latin America,[33] with a lower proportion of female directors than Colombia, Chile, Brazil and Argentina.[34] Although women account for an estimated 38% of the economically active population in Mexico,[35] and one in four households has a woman as its head, their representation in the highest levels of organisations is minimal.[36]

In companies listed on the Mexican Stock Exchange, women held a mere 5.7% of board positions in 2015, and just 6.9% by the middle of 2019.[37] Moreover, in contrast to some other countries in Latin America,[38] Mexico's position has worsened over recent years.[39] Women had held 7.6% of board positions in 2010.[40] And although, according to a 2016 survey, 90% of listed companies said gender diversity was relevant, only 8% said it was on their agenda to address.[41]

III Why Care About Board Gender Diversity?

Does the paucity of female directors in Mexico matter? Should we care about gender diversity on boards and, if so, why? A large body of literature claims we should, and has relied on two main arguments.[42] One is essentially a *moral* argument, and focuses on the intrinsic value of non-discriminatory treatment. The other argument is *consequentialist* – that improving the gender balance of boards will produce desirable outcomes. This has mostly (although not exclusively) focused on the consequential benefits for *companies*

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33 Daniel Aguiñaga, 'Diversidad en los Consejos de Administración' (2014-2015) *Deloitte Mexico,* Boletín de Gobierno Corporativo, p.2.

34 Egon Zehnder, '2016 Egon Zehnder Latin American Board Diversity Analysis' (2016), p.3 available at: <www.egonzehnder.com/files/ez_latam-div-analysis_1.pdf>

35 National Institute of Statistic and Geography *(Instituto Nacional de Estadística y Geografía),* 'Indicadores de Ocupación y Empleo al Primer Trimestre de 2016' (2016) available at: <www3.inegi.org.mx/sistemas/temas/default.aspx?s=est&c=25433&t=1#>

36 Carlos Méndez, *et al.,*'6ta Encuesta de CEO en Mexico' (2015) *PWC-Mexico,* p.22 available at: <www.pwc.com/mx/encuesta-ceo>

37 Richard Kersley *et al.* 'The CS Gender 3000 in 2019: The Changing Face of Companies (October 2019) *Credit Suisse*, Research Institute, p.10, (hereafter 'CS Gender'), available at: <https://www.credit-suisse.com/about-us-news/en/articles/news-and-expertise/cs-gender-3000-report-2019-201910.html>

38 Colombia seems to have the highest levels of gender diversity on the boards of publicly traded companies in Latin America, with 14% of board seats held by women, in 2016; see Egon Zehnder n.34, p.3.

39 Brazil increased from 5.7% in 2015 to 8.6% in 2019; see CS Gender, n.37, p.10.% between 2010 and 2013.

40 Julia Dawson *et al.* 'The CS Gender 3000: The Reward for Change' (September 2016) *Credit Suisse,* Research Institute, p.8.

41 Zehnder n.34, p.5.

42 For a useful overview of debates around boardroom diversity, see Lawrence J Trautman, 'Corporate Boardroom Diversity: Why Are We Still Talking About This?' (2015) 17 *The Scholar* 219.

themselves in having more diverse boards. Because of this emphasis on corporate benefits, it is often labelled 'the business case' for boardroom diversity.

We shall address both arguments below. However, since both arguments (the moral, and the consequentialist) depend on what makes someone a good director, we begin by saying something about the *competencies* directors might need.

A The competencies required of directors

Such competencies will themselves depend on the role that directors should play.[43] It is generally understood that boards are responsible for the 'governance' of their companies,[44] including developing the company's long term strategic vision and holding accountable those managing the company. Mexico's Corporate Governance Code captures this oversight role of the board, recommending that the board should establish internal control and informational quality mechanisms, and appoint, and regularly evaluate the performance of, the chief executive officer and other senior management of the company.[45] Linked to that, the board also has responsibility for ensuring the company's compliance with relevant regulatory obligations.

Besides these strategic and monitoring roles, much literature emphasises the contribution boards can also make to building up productive relationships with those – sometimes referred to as 'stakeholders' – who provide the resources on which a company depends.[46] We should not read 'resources' too narrowly. They include not only tangible inputs (raw materials, labour, credit, and so forth), but also more elusive assets, such as trust and goodwill. Building good relations with, say, employees, consumers, or public regulators benefits the company and is a task to which board members can contribute.

The literature is careful to distinguish the board's governance and resource-acquisition roles, on the one hand, from the role of *managing* the company, on the other. Management is the responsibility of executives, not of the board as a whole. Of course, some directors will also be executives of the company, and for them, their role will include

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[43] See Daniel Ferreira, 'Board Diversity' in Ronald Anderson and H. Kent Baker (eds.) *'Board Diversity' in Corporate Governance: A Synthesis of Theory, Research, and Practice* (John Wiley & Sons, 2010).

[44] See e.g. Renée B Adams, Benjamin E Hermanlin and Michael S Weisbach, 'The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey' (2010) 48 *J. of Econ. Lit.* 58, p.64.

[45] See Code, Best Practice recommendation 8.

[46] For a good introduction to this 'resource dependency theory' of the board's role, see Amy J Hillman *et al.*, 'The Resource Dependence Role of Corporate Directors: Strategic Adaptation of Board Composition in Response to Environmental Change' (2000) 37 *J. of Management Studies* 235.

not only participation in the board's collective responsibility for governance and resource-acquisition, but also carrying out those senior managerial activities that arise from their executive position.

Having described the functions directors must perform, it becomes possible to begin to identify the competencies directors should ideally possess if they are to perform these functions effectively. In the UK, for example, the Institute of Directors divides them into three groups: a body of knowledge, a set of skills, and the 'mind sets' or attitudes that directors require.[47] The Australian Institute of Company Directors offers a finer sub-division, talking of experience, knowledge, skills, attitudes, values and beliefs.[48]

The merits of gender diversity will depend upon how we think these competencies are likely distributed amongst the population as a whole. One possibility is that the distribution of directorial competencies is 'ungendered', in the sense that there is no correlation between a person's gender and their possession of directorial competencies. Any particular directorial skill, knowledge, or attitude is just as likely to be possessed by a woman as by a man. Unfortunately, this seems implausible, and for at least two reasons.

First, as we have seen, directorial competencies include relevant experience. Yet Mexican women still occupy – and thus gain experience of – fewer of the mid- and higher-level executive positions within companies from which directors are often being selected. This may be due, in part at least, to gender discrimination in the recruitment to *those* positions. And this under-representation of women at sub-board level may require separate attention, both as a matter of concern in its own right and as a contributing factor to a lack of gender diversity at board level.

The second reason explains why so much of the debate focuses specifically on 'diversity' – on ensuring that *each individual board* has a mix of both genders. For there may be some directorial competencies where women tend to outperform men (and vice versa). This is, of course, controversial, and risks invoking uncomfortable stereotypes,[49] yet it is supported by a sizeable body of literature.[50] One reason why this might be so should, in

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[47] IOD, Professional Development 2016/17 available at: <https://www.iod.com/Portals/0/PDFs/Training/IoD-Professional-Development-Portfolio-2016-2017.pdf?ver=2016-09-28-100806-000>

[48] See Australian Institute of Directors, *Key competencies for directors*, available online at: <http://aicd.companydirectors.com.au/~/media/cd2/resources/director-resources/director-tools/pdf/05446-2-mem-director-tools-bc-key-competencies-directors_a4_web.ashx.>

[49] See Eleanore Hickman, 'Boardroom Gender Diversity: A Behavioural Economics Analysis' (2014) 14 *J. of Corp.Law Studies* 385, pp.388-9.

[50] See eg Kim Daehyun and Laura T Starks, 'Gender Diversity on Corporate Boards: Do Women Contribute Unique Skills?' (2016) 106 *The American Economic Review* 267, p.270; Renée B Adams, 'Women on boards: the superheroes of tomorrow?' (2016) 27 *The Leadership Quarterly* 371; Ioanna

fact, be relatively uncontentious. Women directors seem particularly well-equipped to enhance a company's reputation for gender equality.[51] The same point applies, as Fairfax notes, to the company's compliance with equality regulation.[52] And other writers have emphasised the importance of the board's diversity in ensuring its legitimacy in the eyes of external stakeholders.[53]

It has also been argued that women may, on average, also possess some attitudinal advantages over men.[54] Women may be more inclusive and 'collegial' in their style of discussing and debating within (board) meetings. They may be more independent minded, less prone to the problem of 'group think' which can undermine collective board decision making, and less likely to engage in excessive risk-taking.[55] To the extent that such advantages do hold for women, then they can help to offset the 'experiential' disadvantage that women suffer.

B Two reasons for caring about board diversity

Returning now to our earlier question: why should we care about board diversity? Turning first to the moral argument, the concern is that a lack of women directors may evidence discrimination. If the imbalance, across a large number of companies, in the number of male and female directors cannot be justified by differences in their competencies, this suggests some directors were selected or rejected not according to their competencies, but rather according to their gender.

It is important to stress that concern about discrimination does not depend on competencies being distributed in an ungendered way. Even if women do, for example, score less well in terms of relevant experience, one should still ask whether the disparity in

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Boulouta, 'Hidden Connections: The Link Between Board Gender Diversity and Corporate Social Performance' (2013) 113 *J. of Business Ethics* 185.

[51] See Mijntje Lückerath-Rovers, 'Female Directors on Corporate Boards Provide Legitimacy to a Company: A Resource Dependency Perspective' (May 2009) *Management Online Review* pp.1-13. Available at SSRN: <https://ssrn.com/abstract=1411693>

[52] Lisa M Fairfax, 'The bottom line on board diversity: a cost-benefit analysis of the business rationales for diversity on corporate boards' (2005) *Wisc. Law. Rev.* 795, pp.825-828. Fairfax refers to this as the 'litigation rationale' for board diversity.

[53] See *e.g.* Elise Perrault, 'Why Does Board Gender Diversity Matter and How Do We Get There? The Role of Shareholder Activism in Deinstitutionalizing Old Boys' Networks' (2015) 128 *J. of Business Ethics* 149.

[54] For useful overviews of some of the relevant literature here, see Adams n.50;Sandeep Gopalan and Katherine Watson, 'An agency theoretical approach to corporate board diversity' (2015) 52 *San Diego L.Rev*. 1.

[55] Brad M Barber and Terrance Odean, 'Boys will be boys: gender, overconfidence, and common stock investment' (2001) 116 *Q.J. of Econ*. 261; James P Byrnes, David C Miller and William D Schafer, 'Gender differences in risk taking: a meta-analysis' (1999) 125 *Psychol. Bull*. 367.

the number of male and female directors was no more than one would expect given the different experience levels of men and women. And if women do indeed score better on some competencies than men, then this should again cause a still greater narrowing in the gap between the number of male and female directors.[56]

One advantage of the moral argument in addressing a lack of gender diversity is that it does not depend on empirical evidence proving that a more diverse board will cause companies to be more successful.[57] Discrimination against women is morally objectionable, and addressing it does not require proof that it will be in companies' own interests to tackle such discrimination.[58] This advantage should not be underestimated for, as we shall see below, there are difficulties in showing empirically that companies do indeed benefit from more diverse boards.

Nevertheless, a disadvantage in relying on the moral argument is that it may carry too little weight with companies themselves. From a strategic point of view, then, it is perhaps unsurprising that much of the debate[59] has tended to focus on the 'business case' for board diversity.[60] Part of the business case is that companies with homogenous boards are not utilising the best talent available. This, clearly, overlaps with the moral argument. Discrimination, which leads companies to appoint less suitable men ahead of more suitable women, not only infringes women's moral rights, but harms companies too.

Note again that 'getting the best talent' means getting the best *mix* of directorial competencies. Doing so should ensure directors who perform better individually, and who also improve the collective performance of the board.[61] The board, as an institution, should

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[56] If competencies are distributed in a gendered way we would expect each individual board to be more gender-balanced. In a board with, say, currently a predominance of male directors, the competencies that one will likely be looking for in the next appointment are, all other things being equal, likely to be those disproportionately possessed by women.

[57] James A Fanto, Lawrence M Solan and John M Darley, 'Justifying Board Diversity' (2011) 89 *North Carolina L. Rev*. 901.

[58] Marc McCann and Sally Wheeler, 'Gender Diversity in the FTSE 100: The Business Case Claim Explored' (2011) 38 *J. of Law and Society* 542.

[59] For arguments to this effect, see for example Hema A Krishnan and Daewoo Park, 'A Few Good Women On Top Management Teams' (2005) 58(12) *J. of Business Research* 1712; Theresa Welbourne, 'Wall Street Likes its Women: An Examination of Women in the Top Management Teams of Initial Public Offerings' (1999) WP 99-07 CAHRS, Cornell University 11; Mary Curtis, Christine Schmid and Marion Struber, 'Gender Diversity and Corporate Performance' (August 2012) *Credit Suisse*, Research Institute, pp.15-17.

[60] For similar analysis in relation to diversity and discrimination in the legal profession, see Clare McGlynn, 'Strategies for Reforming the English Solicitors' Profession: An Analysis of the Business Case for Sex Equality' in Ulrike Schultz and Gisela Shaw (eds) *Women in the World's Legal Professions* (Oxford: Hart Publishing, 2003).

[61] See Bernali Choudhury, 'New Rationales for Women on Boards' (2014) 34 *Oxford J. Legal Studies* 511, p.521.

fulfil *its* roles more effectively if it encompasses a diverse mix of directorial competencies.[62] Hillman notes that "when groups are able to consider more options, generated by having a more diverse set of perspectives, their solutions are better".[63] To be sure, a more diverse board may generate more conflict between its members than one that is more homogenous,[64] and this might sometimes lengthen proceedings and slow decision-making.[65] But the gain is that boardroom debates can be enriched by the different perspectives that different genders bring to bear.[66] If women are indeed better at avoiding 'group think', and at fostering a more collegial and inclusive approach to collective discussions, then the board's own deliberations should improve. Some studies have suggested that women are more "participatory and democratic than men and tend to adopt a more critical attitude",[67] are "less likely to have attendance problems",[68] and are often "better prepared for meetings and ask more questions".[69]

A more mixed board should also be better at building relationships with thosestakeholders who care about the company's commitment to gender equality. And, at least in those companies where a more cautious attitude towards risk might be appropriate, the greater risk aversion that some research suggests female directors exhibit may also be an advantage to the company.[70] Finally, Chen *et al*. suggest that more gender-diverse boards tend to achieve 'greater innovative success', making diverse boards especially valuable where 'innovation and creativity play a particularly important role'.[71]

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[62] Kim and Starks n.50, p.270.

[63] Amy J Hillman, 'Board Diversity: Beginning to Unpeel the Onion' (2015) 23(2) *Corporate Governance: An International Review* 104. See also Katrin Sier and Astrid Carniaux, *2014 Egon Zehnder European Board Diversity Analysis* (Egon Zehnder, 2014) p.3.

[64] See Tailor H Cox and Stacy Blake, 'Managing Cultural Diversity: Implications for Organizational Competitiveness' (1991) 5:3 *Academy of Management Executive* 45.

[65] See Isabel Gallego Alvarez *et al.*, 'The Influence of Gender Diversity on Corporate Performance', (2010) 13(1) *Spanish Accounting Review* 81.

[66] Nada K. Kakabadse *et al.*, 'Gender Diversity and Board Performance: Women's Experiences and Perspectives' (2015) 54(2) *Human Resource Management* 276.

[67] *Ibid* p.269. On the other hand, it is has been suggested that if female directors tend to be more critical, this could lead to a degree of 'over-monitoring' of executive performance: see Renée B Adams and Daniel Ferreira, 'Women in the Boardroom and their Impact on Governance and Performance' (2009) 94(2) *Journal of Financial Economics* 291.

[68] Renée B Adams and Daniel Ferreira, *ibid.* p.292.

[69] Mareva Sabatier, 'A women's boom in the boardroom: effects on performance?' (2015) 47(26) *Applied Economics* 2717, p.2718.

[70] See Vathunyoo Sila, Angélica González and Jens Hagendorff, 'Women on Board: Does boardroom gender diversity really affect firm risk?' (2016) 36 *Journal of Corp.Finance* 26. Álvarez argues that Spanish companies in which women hold more than 40% of board seats have a lower credit risk: María Álvarez, 'Las Mujeres en los Consejos de Administración y Organismos de Decisión de las Empresas' (February 2015) Informa D&B, p.3.

[71] See Jie Chen, Woon S Leung and Kevin P Evans, 'Board Gender Diversity, Innovation and Firm Performance' (November 2015) *SSRN,* available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607295>

So far, we have focused on the beneficial consequences accruing to companies themselves. But having more female directors should also generate wider social benefits. It should help to empower women more generally. It shows that women can reach the highest levels within companies, and in doing so also swells the pool[72] both of positive role models for women and of potential mentors for aspiring female managers and directors.[73] It has also been argued that female directors have a positive influence on a company's corporate social responsibility ("CSR") practices,[74] and may help to moderate excessive executive pay, thereby reducing salary differentials and thus inequality within companies.[75]

To be sure, some of these social gains may also benefit any individual company which helps to deliver them. Enhancing a company's reputation for adhering to good CSR practices may build positive and beneficial relationships with that company's stakeholders.[76] Curtailing excessive executive pay within a company helps both to control agency costs and to reduce discontent amongst other workers within that company.[77] But these social consequences have value in their own right; improvements they deliver to the performance of a company that introduces them are a happy coincidence.

One apparent difficulty that proponents of gender diversity face is supporting their arguments with empirical evidence. The empirical evidence (about the effects of greater diversity) is complex and far from unequivocally supportive.[78] Gallego *et al.* for example, note that '[c]ompanies with higher levels of gender diversity will not clearly obtain better performance',[79] whilst Daunfeldt found no connection between greater gender diversity and firm performance.[80] It is doubtful, however, whether this lack of strong empirical support is in any sense destructive of the case for gender diversity, and for at least two reasons. First, such evidence is primarily relevant to the business case for gender diversity. Even if such

72 Many of these social benefits depend not on the proportion of each company's board members that are female, but on the total number of women that are directors.

73 Lissa L Broome, John M Conley and Kimberly D Krawiec, 'Dangerous categories: narratives of corporate board diversity' (2011) 89 *N. Carolina L.Rev*. 759.

74 Beatríz Cuadrado Ballesteros *et al.*, 'Efecto de la Composición del Consejo de Administración en las Prácticas de Responsabilidad Social Corporativa' (2005) 18(1) *Spanish Accounting Review* 28.

75 See *e.g.* Adams and Ferreira n.67, p.303, who observe that 'the proportion of female directors is associated with more equity-based pay for directors'.

76 Stephen Bear, Noushi Rahman and Corinne Post, 'The Impact of Board Diversity and Gender Composition on Corporate Social Responsibility and Firm Reputation' (2010) 97(2) *J. of Business Ethics* 217; Alvarez *et al.*, n.65, p.58.

77 John Shields *et al.*, 'The Bucks Stop Here: Private Sector Executive Remuneration in Australia' (7 April 2014) Report for the Labour Council of NSW 14.

78 See generally Choudhury n.61.

79 Alvarez *et al.*, n.65, p.81.

80 Steven-Olov Daunfeldt and Niklas Rudholm, 'Does Gender Diversity in the Boardroom Improve Firm Performance?' (2012) 60 *HUI Research* 24.

evidence showed that diverse boards do not improve corporate performance, such would not disprove the claim that board diversity can bring wider social benefits – such as increasing the number of positive role models for women. Nor would a lack of evidence supporting the business case undermine the moral argument for equal treatment.

Second, even if the empirical evidence does not clearly prove that companies are better-off with more diverse boards, equally nor does it clearly disprove that. It does not show that gender *imbalanced* boards generate superior corporate performance. Given that, it might be argued, it is appropriate to put weight on the theoretical arguments advanced in favour of board diversity. If, in the future, the empirical evidence begins to show, clearly and consistently, that companies suffer significant harm as a result of having more diverse boards, then the theoretical arguments will have to be reassessed.

IV Strategies Addressing Gender Diversity

A Regulatory strategies

Much of the debate about how to improve boardroom gender diversity has focused on gender *quotas*. We turn to that shortly. First, however, it is worth noting that much might be done to improve gender diversity through measures addressing the 'process' through which directors come to be appointed, rather than specifying particular 'outcomes' (such as the percentage of women directors that boards are required, or encouraged, to appoint). So, process changes may be introduced to reduce the barriers preventing women gaining the competencies necessary to compete on equal terms with men for directorial appointments. Changes in education practices, in companies' own recruitment and promotion practices at sub-board level, in better promoting positive role models for aspirant female business leaders, and so on, can all help. Likewise, improvements might also focus on companies' own director-selection methods, to ensure recruitment is indeed competency based (rather than reflecting, for example, the conscious or unconscious bias of the recruiter).

Since process measures undoubtedly address the reasons we think gender diversity matters in the first place, why might we move beyond process and focus instead on outcomes – on measures that specify proportions of men and women to be appointed? The answer lies very largely in the limited effectiveness of process-oriented measures. Changes to the social environment that might constrain women's ability to compete for board positions can be slow to achieve, and may have less impact on board diversity than expected or hoped for.[81] Likewise, there are difficulties in *policing* reforms that address companies' own board-recruitment processes, which are often hidden from external scrutiny. And, even when those processes can be made transparent to outsiders, boards' recruitment choices involve an element of business judgement, which is notoriously difficult to review and to challenge. Similarly, whilst improving the pipeline of talented female candidates for board positions seems a better way of ensuring equality of opportunity, it is harder to encourage more women to try if too few women appear to have succeeded. Imposing outcome targets can be one – perhaps short-term – measure to break this vicious circle.

Instead of addressing processes, then, reform might instead focus on outcomes, using norms that specify the gender balance that boards should have. A range of outcome-focused norms might be introduced, varying both in how *precisely* the requisite outcome (the desired gender balance) is defined, and in how *mandatory* compliance is. However, discussion here tends to revolve around a choice between *voluntary targets* and *mandatory quotas*.

To be sure, the use of any outcome norm is itself controversial. First, such norms might themselves lead to discrimination against men, where a less qualified woman is appointed in order to satisfy the norm. The magnitude of this problem is difficult to assess, however. For whilst such discrimination might sometimes occur, it would have to be balanced against all those cases where better qualified women, who would not have been chosen in the absence of the norm, are now appointed because of it.[82] The second criticism of outcome norms is about their consequences. The main concern is that they harm the economic performance of companies that are subject to them, insofar as they lead to less well-qualified board appointments. The empirical evidence – which has mainly focused on the impact of quotas – is, however, unclear.[83] Studies may give different results depending on the way they measure firm performance, and the time scale over which the consequences of such quotas are measured. The latter point may be especially important if, as seems plausible, there is a sizeable time-lag between the introduction of a quota and the improvements a quota produces in the supply of well-qualified female candidates. Effects

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[81] See eg Joanna Tyrowicz, Siri Terjesen and Jakub Mazurek, 'All on board? New evidence on board gender diversity from a large panel of European firms' *European Management Journal* (in press, available at: https://doi.org/10.1016/j.emj.2020.01.001); Nina Smith, 'Gender quotas on boards of directors' (2018) *IZA World of Labor*, doi: 10.15185/izawol.7.v2. However, compare Sudheer Reddy and Aditya Mohan Jadhav, 'Gender diversity in boardrooms – A literature review' (2019) 7 *Cogent Economics & Finance*, Issue 1.

[82] See Siri Terjesen and Ruth Sealy, 'Board Gender Quotas: Exploring Ethical Tensions From A Multi-Theoretical Perspective' (2016) 26 *Bus. Ethics Quarterly* 23, pp.33-34.

[83] For an overview of the evidence, see Smith n.81.

on firm performance may also vary from country to country, depending on factors peculiar to that country.

We will consider some of these criticisms further in our analysis of a range of countries' experiences below. However, and as our analysis of comparator countries also shows,[84] despite concerns about the use of outcome norms, the most compelling argument in their favour is their strategic effectiveness in accelerating improvements in diversity. And this seems to be especially true in respect of the use of quotas.

B Six comparator country experiences

(i) Norway

Norway stands out as being the first country to introduce a legally enforceable gender quota. The so-called 'quota law' was passed by the Norwegian Parliament in December 2003.[85] The quota applies to public limited companies, and varies according to the number of directors on the board. If, for example, the board has more than nine directors, each gender must be represented by at least 40% of the members.[86] Initially, the quota was introduced on a discretionary basis, but produced fewer changes in board membership than expected.[87] With effect from 2008, the quota became mandatory, requiring listed companies to have at least a 40/60 gender balance.[88] The sanctions for non-compliance include liquidation of the company,[89] although liquidation may be avoided where the government considers the firm particularly important for society.[90] And whilst some have described the quota law as 'one of the most extreme measures undertaken,'[91] no company has yet faced dissolution for non-compliance.

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[84] For a broader, but less detailed, overview of OECD countries' practices with regards to the use of targets and quotas on gender diversity, see OECD, n.2, pp.131-134.
[85] Øyvind Bøhren and Siv Staubo, 'Does Mandatory Gender Balance Work? Changing Organizational Form To Avoid Board Upheaval' (2014) 28 *Journal of Corporate Finance* 152.
[86] Deloitte WB n.1, p.135.
[87] See for example Sweigart, who argues that, despite the discretionary norm, 'firms overall achieved little progress in female board membership'; Anne Sweigart, 'Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool For Progress in the United States and Canada' (2012) 32(4) *Northwestern Journal of International Law & Business* 83A.
[88] Norwegian Ministry of Foreign Affairs,'Sharing Norway's experience with gender quotas for boards' (October 2017), available at: < https://www.norway.no/en/missions/eu/about-the-mission/news-events-statements/news2/sharing-norways-experience-with-gender-quotas-for-boards/>
[89] See Bøhren and Staubo, n.85.
[90] *Ibid,* p.154.
[91] Curtis *et al.* n.59, p.23.

Norway's introduction of a mandatory quota has not received universal acclaim. One concern has been a tendency for a small number of women – so-called 'golden skirts' – to accumulate multiple board appointments. The benefits of greater boardroom diversity have, accordingly, spread less widely than intended.[92] A second concern has been that the law, which only applies to public limited companies, has stimulated ineffecient avoidance behaviour by companies. So, Bøhren and Staubo[93] suggested that up to half of those companies subject to the quota (public limited companies, or 'ASAs') chose to change their status to become an 'AS' (closer to the private limited company). Presumably, avoidance of the quota aside, such companies changed to a form that was otherwise sub-optimal for them.

A third concern relates to the quota's impact on the performance of Norwegian firms. Ahern and Dittmar, for example, argued that the quota had had 'a large negative impact on . . . firm value' amongst a panel of 248 Norwegian publicly listed companies.[94] However, later research suggested that any adverse effects were much more limited.[95] Moreover, the effectiveness of the quota in achieving its basic objective of increasing gender diversity within individual companies has been widely noted.[96] In 2002 women held a mere 6% of board seats in Norwegian public companies.[97] This had risen to 36.6% by 2010,[98] to 40.3% by 2017[99] and reached 42.5% in March 2019.[100] Moreover, as Seierstad and Huse emphasise, the benefits of the law can be seen not only in Norway's own increasing board diversity, but in the readiness of other countries to use quotas to secure diversity improvements.[101]

(ii) France

One such country is France which has followed Norway's approach by introducing its own

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[92] *Paul Lansing and Sitara Chandra* 'Quota Systems as a Means to Promote Women into Corporate Boardrooms' (2012) 38 *Employee Relations L J* 3, p.5.

[93] See n.85.

[94] Kenneth Ahern and Amy Dittmar, 'The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation' (2012) 127 *Quarterly Journal of Economics* 137.

[95] See eg B. Espen Eckbo *et al*, 'Board Gender-Balancing and Firm Value' ECGI Finance Working Paper No. 463/2016 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746786

[96] For an overview of relevant literature examining the results of the Norwegian law, see Cathrine Seierstad and Morten Huse, 'Gender Quotas on Corporate Boards in Norway: Ten Years Later and Lessons Learned' in Cathrine Seierstad, Patricia Gabaldon and Heike Mensi-Klarbach (eds) *Gender Diversity in the Boardroom: Volume 1* (Palgrave, 2017).

[97] Norwegian Ministry of Foreign Affairs n.88.

[98] Dawson n.40, p.8.

[99] CS Gender, n.37, p.10.

[100] Statistik sentralbyrå, 'Board and Management in Limited Companies' (March 2019), available at: <https://www.ssb.no/en/virksomheter-foretak-og-regnskap/statistikker/styre/aar>

[101] See n.96.

quota law[102] 'ensuring a minimum level of female representation in boardrooms'.[103] The Copé-Zimmermann Law introduced a boardroom quota in 2011, and this was reinforced in 2014 by the Gender Equality Law.[104] France effectively adopted a two-stage timetable. By January 2014, all listed companies, and some other larger companies,[105] had to have 20% female board membership.[106] This rose to 40% by January 2017.[107] The quotas are mandatory; 'nominations [will] be void and fees suspended for all board members' until the lack of gender diversity is resolved.[108]

Again, the use of quotas seems to have been effective.[109] In 2004 women held just 6% of board positions. This more than doubled, to 12.4%, by 2010 and more than doubled again to 28.5% by 2014.[110] Thus, stage one (20% by January 2014) was met two years before the deadline. Stage 2 was met by 2017, when women were estimated as occupying 42.5% of French boardroom seats.[111] By 2018, that figure had increased to 44.4%, placing France first, globally, in the proportion of female directors..[112] For Zenou et al,[113] the improvements in board diversity were largely a product of the mandatory force of the quota requirement, which helped to nullify much of the opposition that might otherwise have resisted change.

(iii) Germany

In March 2015, Germany also enacted a gender quota for some supervisory boards.[114] This law requires publicly listed companies, with equal employee co-determination,[115] to ensure

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[102] On motives – both ethical and economic – for the law's introduction, see Sabatier, n.69, p.2724.
[103] Tim Wimborne, 'France Sets Quota for Women on Big Companies' Boards' (January 2011) *Reuters*.
[104] See Deloitte WB n.1, p.102; and Emmanuel Zenou and Bénédicte Brullebaut, 'Gender Diversity on French Boards: Example of a Success from a Hard Law' in Seierstad *et al* n.96.
[105] i.e. those with at least 500 employees (or, from January 2020, 250 employees) and revenues over €50,000,000.
[106] CCRE, 'The Quota-Instrument: Different Approaches Across Europe', (European Commission's Network to Promote Women in Decision-making in Politics and the Economy, WP, April 26, 2010), p12.
[107] Deloitte WB, n.1, p.102.
[108] Curtis *et al.* n.59, p.25.
[109] See Zenou et al, n.119.
[110] Sier and Carniaux, n.64, p.14.
[111] CS Gender, n.37, p.10.
[112] *Ibid.*
[113] See n.119, pp.116-117.
[114] Article 1.4 of the *Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen* became effective in January 2016. For the background to, and detail of, the German quota, see Alexandra Fedorets et al, 'Gender Quotas in the Boardroom: New Evidence from Germany' (2019) *DIW Discussion Papers* 1810, available at http://www.diw.de/discussionpapers
[115] ie companies whose supervisory boards must have an equal number of employee and shareholder representatives. These are the approximately 100 largest listed companies.

at least 30% female membership of their non-executive supervisory boards.[116] The requirement applies as new board appointments are made. So, when a company subject to the quota is appointing a new director, if that company is currently below the 30% requirement, then it must appoint a woman. The principal sanction for non-compliance is that any appointment made in breach of the foregoing is treated as void, and the board position is treated as still vacant.[117] This will not prevent the board from functioning, but 'may do some reputational damage, but only at companies that are in the public eye'.[118] The statutory provision is buttressed by the German Corporate Governance Code, which since 2015[119] has included recommendations on setting targets for the promotion of gender diversity on management and supervisory boards.[120]

Contrary to concerns raised in other countries about the impact of quotas on firm performance, the study carried out by Fedorets *et al* did not establish any significant negative effect of the quota on firm profitability.[121] And although the limited sanction attaching to the German quota provisions has led some to doubt their impact,[122] the law seems nevertheless to have been relatively successful in improving supervisory board diversity. In 2008, women held only 7.8% of boardroom positions in Germany.[123] Although this increased to 23% by 2012, it fell again to 21% by 2014 and remained at that level during 2015.[124] However, after the implementation of the quota, female representation increased from 26.7% in 2016, to 29.4% during 2018, reaching the 30% target set on supervisory boards by 2019 with 32.4% of female representation.[125]

It is true that the position has been less encouraging on management boards There, evidence suggests that the proportion of female directors barely increased, from 6.5% in

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[116] A larger group of approximately 3,500 companies (those which are either listed or subject to co-determination) must also publish their own self-selected targets for improving board diversity.
[117] Caroline Copley, "German Parliament Approves Legal Quotas for Women on Company Boards" (Berlin, 2015) *Reuters*, available at: < https://www.reuters.com/article/us-germany-women-quotas/german-parliament-approves-legal-quotas-for-women-on-company-boards-idUSKBN0M214S20150306>
[118] Susanne Amann *et. al*, 'The Slow Pace of Gender Equality in Corporate Germany', (Germany, January 06, 2016) *Spiegel*, available at < http://www.spiegel.de/international/germany/german-firms-slowly-adjust-to-new-boardroom-quota-law-a-1070622.html>
[119] And effective as of January 2016.
[120] Deloitte WB n.1, p106.
[121] See Fedorets *et al*, n.115.
[122] Renuka Rayasam, 'Why Germany's New Quota for Women On Boards Looks Like a Bust' *Fortune* (March 11, 2016) available at: < http://fortune.com/2016/03/11/germany-board-quota-women/>
[123] Daniel Costa-Roberts, 'German Parliament Passes Gender Quota for Corporate Boards' (March 7, 2015), *PBS.*
[124] Dawson n.40, p.8.
[125] CS Gender, n.37, p.10.

2016[126] to 8% by 2017, increasing by an additional 1% by the end 2018[127] and remained at 9% during 2019,[128] showing little improvement on a very low starting point. But management boards are not covered by the quota law: the limited improvements achieved for them, compared to those realised in supervisory boards, seems to support, rather than undermine, the effectiveness of quotas.

(iv) United Kingdom

In contrast to the other countries analysed so far, the UK government has refused to set a legislative quota. Instead, the UK's approach has been more exhortative. In 2010 the Government set up its *Women on Boards* review, chaired by Lord Davies, to look at how obstacles to increasing the number of women directors might be removed. In its first substantive Report, the Davies Review recommended that FTSE 100 companies[129] achieve a minimum of 25% female representation by 2015.[130] In 2015, this target was updated, recommending that all FTSE 350 companies meet a voluntary target of 33% female directors by 2020.[131]

The recommendations of the Davies Review were also reflected in changes to the UK Corporate Governance Code. In 2016, it was amended to provide that 'the search for board candidates should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender'.[132] In addition, it now recommends that there be a 'formal, rigorous and transparent procedure' for the appointment of new directors.[133] These recommendations are enforced on a 'comply or explain' basis.

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[126] DW Akademie, *"Estudio: Solo 7.3 Por Ciento de Mujeres Dirigen Empresas en Alemania"* (January 2018), available at: <http://www.dw.com/es/estudio-solo-73-por-ciento-de-mujeres-dirigen-empresas-en-alemania/a-42083349>

[127] Elke Holst and Katharina Wrohlich, 'Increasing Number of Women on Supervisory Boards of Major Companies in Germany; Executive Boards Still Dominated by Men'(January 2019) DIW Berlin (vol.9) p19, available <https://www.diw.de/documents/publikationen/73/diw_01.c.612031.de/dwr-19-03-1.pdf>

[128] Martina Schmid *et al.*, 'Board Diversity in Germany & the UK – What Works' (November 8, 2019) German British Forum, available at: <http://www.gbf.com/board-diversity-in-germany-the-uk-what-works/>

[129] That is, the 100 largest companies listed on the London Stock Exchange.

[130] Davies Review, *Women on Boards* (2011) Recommendation 1, p18; available at https://ftsewomenleaders.com/wp-content/uploads/2015/08/women-on-boards-review.pdf

[131] Davies Review, *Improving the Gender Balance on British Boards: Five Year Summary* (2015) p7; available at: https://ftsewomenleaders.com/wp-content/uploads/2015/11/Davies-Review-Five-year-Summary-Oct-2015.pdf

[132] UK Corporate Governance Code (April 2016), B:2.

[133] See now UK Corporate Governance Code (2018), Principle J. The current version is available at: https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code

Although the UK has chosen recommended targets in place of mandatory quotas, the level of change achieved has nevertheless been significant. According to the Davies Review's own *Five Year Summary Report*,[134] the proportion of women directors in FTSE 100 companies increased from just 12.5% in 2011 to 26.1% by October 2015, and reached 30.6% by 2019.[135] Thus, the 25% target set by the Davies Review was achieved, and on a voluntary basis. As for FTSE 250 companies, the proportion of female directors increased from 7.8% in 2011 to 19.6% by October 2015,[136] reaching 27.5% by November 2018.[137]

In November 2016, the Hampton-Alexander Review was launched, to continue the work begun by the Davies Review.[138] Like its predecessor, the Hampton-Alexander Review is also seeking to use 'soft' (non-legally enforceable) targets to encourage listed companies to improve board diversity. In its first report, published in 2016, it urged FTSE 350 companies to have women occupying a least 1/3 of board positions by the end of 2020.[139] By November 2018, it was reported that over 30% of board appointments across FTSE 350 companies were women.[140]

Whilst the UK has undoubtedly achieved a good deal of progress, and has done so through merely voluntary targets, it is worth noting that the targets set – 25% by the end of 2015, and 33% by 2020 – are more modest than those achieved for other countries. Norway and France, as noted above, have each used quotas to set, and achieve, targets of 40%. Moreover, much of the progress has been achieved by increasing the number of female *non-executives*. For instance, the percentage increased from 33.7% by 2016 to 43.2% by 2018 and 52.7% by 2019.[141] The gender imbalance amongst executive directors remains substantially greater, 'leaving the executive board to continue to be dominated by men',[142] In 2015, for example, only 8.6% of executive directors of FTSE 100 companies were

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[134] n.146.
[135] Spencer Stuart, '2019 UK Spencer Stuart Board Index' (2019), p13, available at: <https://www.spencerstuart.com/-/media/2019/ukbi-2019/uk_board_index_2019_final_version.pdf>
[136] *Ibid*.
[137] Ben Chapman, 'UK Firms Set to Fall Short of Government Targets for Women on Boards' (July 1, 2019) The Independent, available: <https://www.independent.co.uk/news/business/news/women-on-boards-review-gender-diversity-ftse-100-250-a8982891.html>
[138] For the work and output of the Hampton-Alexander Review, see generally: https://www.gov.uk/government/publications/ftse-women-leaders-hampton-alexander-review
[139] See *Hampton-Alexander Review: FTSE Women Leaders* (November, 2016) available at: https://ftsewomenleaders.com/wp-content/uploads/2016/08/FINAL-HA-Review-Nov-2016.pdf
[140] *Hampton-Alexander Review: FTSE Women Leaders* (November, 2018) available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764520/hampton-alexander-review-report-nov18.pdf
[141] Spencer Stuart, n.136, p.17
[142] Julia Kollewe and Shane Hickey, 'A Third of Boardroom Positions Should Be Held By Women, UK Firms Told', (October 29, 2015) *The Telegraph.*

women, increasing to 9.8% by 2017 and to 10.9% by June 2019.[143] However, that figure fell to a mere 4.6% in FTSE 250 companies by 2015, which increased to 7.7% by 2017 and to 8.4% by 2019.[144] The lack of progress in improving diversity amongst executive directors in the UK was examined and criticised in a report by the Equality and Human Rights Commission, which also noted that some of the increases in the proportion of women directors was being achieved simply by reducing board size, rather than by appointing more women.[145]

(v) Spain

Until comparatively recently, Spain had a very low rate of female representation in corporate boards.[146] In 2003, for example, only 3% of board seats were held by women.[147] In response, board diversity has been addressed both in Spain's corporate governance code, and through a legislative target.

The Gender Equality Act of 2007[148] introduced a (voluntary) gender target of 40% female board representation, for large and listed companies, to be achieved by 2015. Other companies with more than 250 employees must present an 'equality plan' for achieving equal treatment between women and men.[149] Although, as noted, the 40% gender target is not mandatory, "the lack of diversity will be considered when State contracts and subsidies are awarded".[150]

Buttressing the voluntary target found in the 2007 Act are the provisions of Spain's corporate governance code. In 2006, the Spanish government introduced the Unified Good Governance Code of Listed Companies, with the purpose of improving corporate

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[143] Susan Vinnicombe *et al.*,'The FTSE Board Report 2019' Cranfield University (2019) p.10, available at https://www.cranfield.ac.uk/som/expertise/changing-world-of-work/gender-and-leadership/female-ftse-index.
[144] *Ibid* p.29
[145] See Equality and Human Rights Commission, An inquiry into fairness, transparency and diversity in FTSE 350 board appointments (2017) available at: https://www.equalityhumanrights.com/sites/default/files/ehrc_inquiry_ftd_ftse350_updated_22-4-16.pdf
[146] Kevin Campbell and Antonio Mínguez-Vera, 'Gender Diversity in the Boardroom and Firm Financial Performance' (2007) 83(3) *J. of Business Ethics* 446.
[147] Sier and Carniaux, n.63, p.14.
[148] *Ley Orgánica 3/2007 Para la Igualdad Efectiva de Mujeres y Hombres* (Gender Equality Act) (BOE NO.71, March 23, 2007) España: Jefatura del Estado.
[149] Articles 75 and 45 of the Gender Equality Act. Additionally, in 2014, the Corporate Enterprises Act was passed, requiring "listed and non-listed companies to set minimum targets for women on their boards'; see Deloitte WB n.1, p.154.
[150] Dawson *et al.*, n.40, p.49.

governance and the management of Spanish companies.[151] Rule 14 of the Code's current version provides that "by 2020, companies are expected to have at least 30 percent of board seats reserved for women" and a proper explanation for non-compliance must be provided.[152] However, the Code's provisions are, as is typical, enforced only on a 'comply or explain' basis.

Female representation on Spanish corporate boards has undoubtedly improved.[153] In 2010, the proportion of board seats held by women was a mere 10.3%,[154] but this had increased to 13.7% by 2013, to 18.5% by 2016, and to 23.8% by October 2019.[155] Nevertheless, it has been noted that in 2019, six major companies listed in the Spanish Exchange Index (IBEX 35) had no women on their boardrooms and only five companies had a 30% female representation.[156] Izquierdo has estimated that it could take 14 years to reach gender parity on listed companies' boards.[157] Palá-Laguna and Esteban-Salvador emphasise the lack of effective enforcement behind the Spanish recommendations.[158] The pressures on companies to follow and implement the provisions of Spain's corporate governance code are too weak to procure effective change, they note, with 'few reputational consequences for Spanish listed companies that do not comply'.[159]

(vi) The USA

In 2018, California became the first US state to require companies to have female representation at the board seats of public companies based in such state.[160] The law applies to any publicly traded corporation (regardless of its place of incorporation) that has 'principal executive offices' located in California. Such companies were required

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[151] *Código Unificado de Buen Gobierno de las Sociedades Cotizadas (*Unified Good Governance Code of Listed Companies) (Comisión Nacional Bancaria y de Valores, February 2015) Spain. Available at: <http://www.cnmv.es/docportal/publicaciones/codigogov/codigo_buen_gobierno.pdf> Introduction, 7
[152] The New Good Governance Code of Listed Companies, rule 14.5. The recommendation applies only to listed companies.
[153] Deloitte WB, n.1, p.63.
[154] Sier and Carniaux, n.63, p.14.
[155] CS Gender, n.37, p.10.
[156] See Compromiso Empresarial, 'Solo el 26% de Miembros de los Consejos de Administración del IBEX 35 Son Mujeres' (October 2019) CE, available at: <https://www.compromisoempresarial.com/transparencia/buen-gobierno-transparencia-2/2019/10/solo-el-26-de-miembros-de-los-consejos-de-administracion-del-ibex-son-mujeres/>
[157] Mirian Izquierdo, *¿Es una Involución la Política de Igualdad de Género en los Puestos de Toma de Decisión en España?* Confilegal (December 2017) available at: <https://confilegal.com/20171213-es-una-involucion-la-politica-de-igualdad-de-genero-en-los-puestos-de-toma-de-decision-en-espana/>
[158] See Reyes Palá-Laguna and Luisa Esteban-Salvador, 'Gender Quota for Boards of Corporations in Spain' (2016) 17 *Eur Bus Org Law Rev* 379.
[159] Ibid, p.401. See also Álvarez, n.70, p.2.
[160] California, Senate Bill No. 826, Chapter 954 (September 30, 2018), 301.3(a)

to have at least one female director by 2019. From 2021, the minimum number increases: for five-person boards, there must be at least two female directors, and for board of six or more persons, at least three female directors.[161]

Apart from California, it is perhaps surprising to learn that there are currently no legislative instruments setting a target, or quota, for female boardroom representation in other US states. As Wiersema and Mors note, 'the US is now among the few Western developed economies with neither voluntary nor mandatory targets'.[162] On the other hand, the US does have a number of organisations championing boardroom gender balance. Examples include the 'Thirty Percent Coalition'[163] and '2020 Women on Boards.'[164] Notwithstanding that, US boards have historically been more diverse than those of some of the other countries addressed here. In 2010, women held 12.7% of board seats, increasing to 13.7% in 2013 and 16.6% during 2015.[165] Moreover, the boards of the largest companies – the S&P 500 – were even more diverse. By the end of 2015, 19.9% of directors of such companies were women, [166] increasing to 22% by 2018.[167] Moreover, 14.2% of those companies were approaching gender parity, with more than 30% female representation.[168] By October 2019, the percentage of women directors had increased to 24.1%.[169]

V Reform Suggestions for Mexico

Any attempt to offer a route-map for improving board diversity in a particular country must take account of the reasons why that country has suffered a lack of diversity. Section A addresses some of those, whilst section B suggests a number of measures which ought to be taken in response.

A Why so little board diversity in Mexico?

[161] *Ibid.* 301.3(b)
[162] Margarethe Wiersema and Marie Louise Mors, 'What Board Directors Really Think of Gender Quotas' (November 14, 2016) *Harvard Business Review*.
[163] This is a 'national organization committed to the goal of women, including women of color, holding 30% of board seats across public companies; see www.30percentcoalition.org
[164] This is a 'national campaign to increase the percentage of women on US company boards to 20% or greater by the year 2020'; see www.2020wob.com
[165] Dawson *et al.* n.40, p.8.
[166] Catalyst, 'Catalyst Women on Board: Sponsorship Sparks Change' (March 2018) New York: *Catalyst*, available at: <http://www.catalyst.org/blog/catalyzing/catalyst-women-boardtm-sponsorship-sparks-change>
[167] CS Gender, n.37 p.10.
[168] Catalyst, a non-profit organization. Catalyst, '2015 Catalyst Census: Women and Men Board Directors' (2016) New York: *Catalyst.*
[169] See CS Gender, n.37.

Many factors, no doubt, have contributed towards Mexico's historically low rate of female board membership. Four in particular deserve emphasis.

First, what might be termed 'sociocultural factors' undoubtedly play a role.[170] These encompass cultural views and practices concerning the proper role of women in Mexican society generally, and within the workplace in particular. Although there have been improvements in gender equality generally in Mexico, a number of factors continue to drive inequality between men and women. They include some educational policies, the influence of religious institutions, and the *"machismo"* that permeates Mexican society.[171] In a survey carried out by the Strategic Communications Office in 2016, 61.2% of 600 interviewees considered Mexican society to be characterised by a *macho* culture,[172] which includes the belief that men are superior to women.[173] These sociocultural factors may well, consciously or unconsciously, influence selection committees that are appointing new board members. However, the problem goes much deeper. It influences the career expectations that are communicated to different genders from childhood, the educational opportunities each gender enjoys, the assignment of family (and especially child-care) responsibilities outside of the workplace, and so on. All these undoubtedly affect the 'pipeline' of qualified women in sub-board level managerial positions in Mexico.

The second factor contributing towards Mexico's historical lack of boardroom diversity arises from its peculiarly concentrated, and family-oriented, share ownership patterns.[174] Corporate controllers likely often see themselves, or members of their family, as the most appropriate directors for the company. To put this in the language used in Part III, in such companies 'being the controller, or a member of the controlling family' will count as the primary 'competence' which any director should have. In order to ensure that the

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[170] See generally Amalia Carrasco, Claude Francoeur, Réal Labelle, Joaquina Laffarga and Emiliano Ruiz-Barbadillo, 'Appointing Women to Boards: Is There a Cultural Bias?' (2015) 129 *Journal of Business Ethics* 429.

[171] Alberto Elenes, *'México Continua Siendo un País Machista, Advierte la Investigadora* (March 2017) *Uniradio Informa*, available at: <http://www.uniradioinforma.com/noticias/reportajesespeciales/469191/mexico-continua-siendo-un-pais-machista-advierte-investigadora.html>

[172] According to a 2016 national survey, 26.6% of women who work or have ever worked have experienced some violent act, mainly of a sexual nature and of gender or pregnancy discrimination: INEGI, '*Resultados de la Encuesta Nacional Sobre la Dinámica de las Relaciones en los Hogares'* (ENDIREH) 2016) (August 2017), Bulletin No. 379/17, *INEGI*, p.2 available at: <http://www.inegi.org.mx/saladeprensa/boletines/2017/endireh/endireh2017_08.pdf>

[173] Kaleydoscopio, *'Machismo, Una Mala Costumbre Entre Muchos*' (December 2016) *GCE*, available at: <http://www.kaleydoscopio.mx/index.php/archiveros/item/5277-machismo-una-mala-costumbre-entre-muchos-mexicanos>

[174] More than 90% of the private and listed companies in the Mexican Stock Exchange have family representation in the capital and control. Jesús González, 'Empresas Familiares en México: El Desafío de Crecer, Madurar y Permancer' (November 2013*) KPMG-México*, p5.

business stays in the family, shareholders will sometimes be willing to sacrifice the possibility of hiring professionals with experience and expertise in the field, for the appointment of less well-qualified family members. Of course, this of itself need not lead to a propensity to appoint men rather than women to be the directors of such companies. If women were just as likely as men to set up, and enjoy control over, companies, then a propensity for controllers to appoint themselves would produce no gender bias against female directors. However, when viewed in the light of Mexico's cultural background, matters change. For controllers are indeed more likely to be male, an imbalance that feeds through into boardroom appointments. And whilst 'family members' of the controller could encompass women as much as men, cultural attitudes are likely to ensure that the family members appointed to the board are more likely to be sons or brothers than daughters or sisters.

The above points are reinforced by the fact that stronger corporate governance policies tend to be implemented in larger companies (which are less likely to be family dominated), and this seems to be true in Mexico too. A 2015 survey by PWC of 145 directors of Mexican companies found that 66% had implemented diversity strategies, 17% were planning to do so and only 13% were not planning to have one.[175]

The third factor is the relative absence, or weaker influence, of Mexican organisations advocating for greater board diversity. The only example of such an organisation in Mexico is the recently[176] opened 'chapter' of Women Corporate Directors (WCD), a US not-for-profit that aims to increase female board representation.[177] Beyond this, there are no others with the specific purpose of increasing female board membership.

Finally, a historical lack of diversity is likely to be somewhat self-perpetuating. The fewer women who already hold board seats, the harder it is to encourage companies to appoint more. With fewer existing female directors, prospective female appointees have fewer role models to emulate, or mentors to offer support. The lack of female directors can reinforce (or, at least, less often challenge) existing gender stereotypes amongst those recruiting new board members. As Sabatier notes, "recruiting female directors is not a random process but rather a result of a corporate strategy implemented over the long run."[178] But with fewer existing women on boards, companies' existing strategies and policies are

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[175] See Méndez *et al.* n.36, p.23.
[176] In January 2018.
[177] https://www.womencorporatedirectors.org
[178] Sabatier n.69, p.2724.

less likely to include a commitment to gender diversity.

B Proposals for reform

We shall argue, below, that the imposition of a binding quota is appropriate for Mexico. However, first, we should note that the 'process' reforms we identified above ought also to be adopted. As we have seen, some of the factors which contribute to Mexico's gender imbalanced boards concern deeper aspects of Mexico's culture, and will require broader policies directed towards achieving equality of opportunity between genders. Addressing female opportunities in education, for example, in sharing responsibility for care of children or family members, or in recruitment and promotion to sub-board level appointments,[179] can all help to address the 'pipeline' problem noted above. Policies that support and help female entrepreneurs should mean more female controlled companies and, as a by-product, more female directors, and so on.

Likewise, the process of companies' own recruitment should be addressed too. So, for all SAs we suggest non-binding recommendations of good corporate practice,[180] emphasising the importance of recruiting by reference to candidates' competencies, rather than their gender. Such recommendations would also emphasise the value in achieving the *mix* of competencies that a diverse board encompasses, and the importance of transparency in the recruitment process, so that companies' observance of these principles would be open to scrutiny.

However, for SABs,[181] we would go further. First, the proposed reforms to the recruitment process should be added to Mexico's *Code of Principles and Best Practices of Corporate Governance*.[182] Second, and more significantly, SABs should be subject to a quota requirement. This should be set at an admittedly modest level in the first instance but should, as has occurred in many other countries, be increased over time. Three principal issues arise here.

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[179] For proposals to improve the inclusion of women in the Mexican workforce generally, see A.T.Kearney, *Beyond Gender Diversity: Inclusion 2.0* (A.T.Kearny Inc, 2017).

[180] Both the Mexican Government (www.diputados.gob.mx), and bodies such as the Mexican Business Council (www.cce.org.mx) have a role to play here.

[181] See n.15 for explanation of the nature of a SAB. Recall also that a SAPIB must adopt the form of a SAB within 10 years. It might be appropriate for SAPIBs to be encouraged, or even required, to have to satisfy the SAB quota as a condition for adopting the SAB form, in order to smooth the transition process.

[182] n.24.

The first is: why choose a quota, rather than a voluntary target? The reason lies primarily in the superior effectiveness of quotas, as evidenced by the analysis of other countries' experience. We accept that gender quotas suffer the disadvantage of a 'one size fits all' approach. But the severity of this loss of 'flexibility' depends in part upon how demanding, or how modest, is the quota that is being applied. And it is outweighed, we would argue, by the clear compliance advantages which a mandatory quota is likely to enjoy in Mexico.

It is true that some countries – the UK and the USA are notable examples – have achieved, without resort to quotas, higher levels of board diversity than Mexico enjoys. But we regard those countries' success as a poor guide to what Mexico might achieve with a similar reliance on voluntary targets. Both countries have stronger support for board diversity amongst voluntary and campaigning organisations. Both countries have different patterns of share ownership, with a greater separation of ownership and control, and more powerful institutional investors adding to the pressure for diversity. And both countries start from a position already significantly ahead of Mexico.

The second issue is: what quota? The quota itself should, as in the German system, apply on the occasion of new board appointments. An SAB that fell below the required proportion of female directors would have to fill its next board appointment with a female director. As to the required proportion, a multi-stage timetable could be adopted, similar to that in France. The aim should be to increase the proportion of female directors incrementally, over a period of time. Given Mexico's historically low starting point, we would suggest a target in the region of 15% to be achieved within, say, a period of five years. The second stage target could be set provisionally at say somewhere between 25% and 30%, to be reached within 10 years. However, both could be subject to review during the first stage, based on companies' experiences in complying with the first target.

The third issue is: how mandatory? What sanctions should apply for non-compliance with the specified quota? We suggest two, intended to influence both the general shareholders meeting and the existing directors. First, and as in the German system, an appointment of a male director made in breach of the quota would be void. Shareholders, presumably, would not want their boards to be subject to such 'empty chairs', nor the validity of their decisions to be open to question. Second, the fees of existing board members should be suspended where a (male) director is appointed in breach of the quota. In this sense, the existing directors will pressure the general shareholders meeting to achieve a diverse board with a *mix* of competencies and, therefore, act in accordance with the law.[183]

VI Conclusions

Board diversity matters. Its absence suggests women are suffering discrimination as they compete for board appointments, whilst companies and societies are better off when their boards are more diverse. But extolling the virtues of board diversity is one thing; offering a persuasive strategy to achieve it is quite another. This article has sought to do that.

The core of the strategy is a combination of process reforms – to ensure women have equal opportunities as they seek to rise to the top of the companies they serve – with a realistic quota. The latter would be applied in two stages, to give companies chance to adjust to its demands, and would be mandatory. All SABs would have to comply with it as they make new board appointments. If the experience of countries such as Norway and France are revealing, then they suggest that such quotas work well to achieve significant – and comparatively rapid – improvements.

[183] It might be argued that, given the appointment of the director in breach of the quota might be effected by shareholders, it would be unfair to penalise directors. However, this is to ignore the influence which the board, in practice, has on the selection of new directors (even where shareholders formally approve the board's choice).